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Candace Havens  
Director

## WORKING SESSION MEMORANDUM

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**DATE:** April 19, 2013


**TO:** Alderman Marcia T. Johnson, Chairman  
Members of the Zoning and Planning Committee

**FROM:** Candace Havens, Director of Planning and Development  
James Freas, Chief Planner, Long-Range Planning

**RE:** #77-13: ALD. GENTILE & HARNEY requesting that the Board of Aldermen amend the City of Newton Zoning Ordinances so that any properties that have been built and purchased that may now be considered non-compliant due to the recent court decision in the Mauri/Chansky case, be considered valid non-conforming properties.

**MEETING DATE:** April 22, 2013

**CC:** Board of Aldermen  
Planning and Development Board  
Donnalyn Kahn, City Solicitor



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### INTRODUCTION

As a result of the court decision invalidating the City's interpretation of section 30-15(c)(3)(b) any home built on one of these lots formerly in common ownership would now be considered non-compliant according the Newton Zoning Ordinance raising potentially severe issues for these homeowners. At this time, City staff has been able to confirm nine such lots, which were developed with either single- or two-family homes between 2001 and 2009. The Planning and Law Departments are exploring two options for rectifying this situation such that these homes would not be noncompliant: first, an amendment to section 30-15(c)3 and second, whether variances could be issued to these properties.

## Zoning Amendment

The Zoning Ordinance amendment option would allow these homes to become nonconforming under the provisions of section 30-15(c). In this context, “nonconforming” simply means that the house exists legally and may be modified or expanded consistent with the regulations of the zoning ordinance, but the dimensions of the lot are not consistent with the current requirement of the zoning ordinance for the zoning district in which that lot sits. The best approach to incorporating this policy into the zoning ordinance that staff has been able to identify thus far would be to add an additional provision to 30-15(c)3 as shown below.

### *Proposed text for 30-15(c)3*

#### (3) Either

a) The lot was not held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the lot in question,

**OR**

b) If the lot was held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the lot in question, such lot had on it a single-family or two-family dwelling;

**OR**

#### c) If the lot was:

i) not the site of a single or two family dwelling as of July 7, 2001; and

ii) was held in common ownership at any time after January 1, 1995 with an adjoining lot that had continuous frontage on the same street and the adjoining lot was the site of a single or two family dwelling; and

iii) the lot has on it a single or two family dwelling that was constructed in compliance with a building permit issued between July 7, 2001 and October 6, 2009.

Amending the zoning ordinance to include this, or a similarly effective provision, would have the advantage of protecting all nine of the identified homes, as well as any others that may not have been found to-date, in a single action. There are two disadvantages to this approach: 1) it creates a small, special case provision in the ordinance that contributes to the overall challenge of the usability of the ordinance (this is a minor concern in this context, and 2) it could be found to be a violation of the equal protection clause, a.k.a. spot zoning. There is a clear public purpose to the action, but the exclusion of other similarly-situated lots from the benefit provided by this section of the zoning Ordinance could be found to be arbitrary should a property owner choose to bring a lawsuit against the City.

## Variance

The Planning and Law Departments are also considering the option of applying to the Zoning Board of Appeals (ZBA) for variances for each of the effected lots. The granting of a variance requires three findings according to the Massachusetts General Laws Chapter 40A, Section 10:

1. *“owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located”;*
2. *“a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial of otherwise, to the petitioner”;* and
3. *“desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.”*

While meeting the requirements of these findings for the lots in question would require a well-constructed argument, and could certainly be subject to challenge, staff believes that an effective argument could be made. The key aspects of such an argument would be to demonstrate that the situation faced by these property owners is not generally shared by other properties in the neighborhood or zoning district, it is a hardship created by the shape (size) of the lot, it is not knowingly self-inflicted, that it represents a financial hardship not just to themselves but to all potential future owners, and that granting the variance would not be to the detriment of the community.

The primary advantage of the variance approach is that it would potentially be less subject to challenge. Conversely, protection for these homes would only be available as they are found; though a variance could be requested each time one is discovered. Staff does not believe there are a significant number of these lots that have already been built on. This approach would depend on the ZBA granting the variances, subject to making the necessary findings as outlined above.

## **NEXT STEPS**

The Planning Department recommends that the Committee discuss its preferences regarding the two approaches described above. In addition, the Committee could consider employing both approaches, for example the zoning amendment could be prepared and implemented if the ZBA fails to grant the requested variances.